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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/677,746	10/03/2000	Michael E. Reedy	3142/34	4391

27383 7590 10/02/2002

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EXAMINER
KUHNS, ALLAN R

ART UNIT	PAPER NUMBER
1732	11

DATE MAILED: 10/02/2002

Please find below and/or attached an Office communication concerning this application or proceeding.

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SERIAL NUMBER	FILING DATE	FIRST NAMED APPLICANT	ATTORNEY DOCKET NO.

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Below is a communication from the EXAMINER in charge of this application

COMMISSIONER OF PATENTS AND TRADEMARKS

ADVISORY ACTION

☐ THE PERIOD FOR RESPONSE:

a) ☐ is extended to run _____ or continues to run _____ from the date of the final rejection

b) ☐ expires three months from the date of the final rejection or as of the mailing date of this Advisory Action, whichever is later. In no event however, will the statutory period for the response expire later than six months from the date of the final rejection.

Any extension of time must be obtained by filing a petition under 37 CFR 1.136(a), the proposed response and the appropriate fee. The date on which the response, the petition , and the fee have been filed is the date of the response and also the date for the purposes of determining the period of extension and the corresponding amount of the fee. Any extension fee pursuant to 37 CFR 1.17 will be calculated from the date of the originally set shortened statutory period for response or as set forth in b) above.

☒ Appellant's Brief is due in accordance with 37 CFR 1.192(a).

☒ Applicant's response to the final rejection, filed AUG. 26, 2002 has been considered with the following effect, but it is not deemed to place the application in condition for allowance:

1. ☐ The proposed amendments to the claim and /or specification will not be entered and the final rejection stands because:

   a. ☐ There is no convincing showing under 37 CFR 1.116(b) why the proposed amendment is necessary and was not earlier presented.

   b. ☐ They raise new issues that would require further consideration and/or search. (See Note).

   c. ☐ They raise the issue of new matter. (See Note).

   d. ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal.

   e. ☐ They present additional claims without cancelling a corresponding number of finally rejected claims.

   NOTE: _____

2. ☐ Newly proposed or amended claims _____ would be allowed if submitted in a separately filed amendment cancelling the non-allowable claims.

3. ☒ Upon the filing an appeal, ~~the proposed amendment ☐ will be entered ☐ will not be entered and~~ the status of the claims will be as follows: brief

   Claims allowed: NONE
   Claims objected to: NONE
   Claims rejected: 1-50

   However;

   ☐ Applicant's response has overcome the following rejection(s): _____

4. ☒ The affidavit, exhibit or request for reconsideration has been considered but does not overcome the rejection because OF THE REASONS SET FORTH IN THE ATTACHMENT.

5. ☐ The affidavit or exhibit will not be considered because applicant has not shown good and sufficent reasons why it was not earlier presented.

☐ The proposed drawing correction ☐ has ☐ has not been approved by the examiner.

☒ Other SEE ATTACHMENT

*U.S. GPO: 1997-417-381/62704

ATTACHMENT TO ADVISORY ACTION

Applicants again argue that they did not acquiesce to the restriction requirements and did not agree to file a divisional application, but instead argued that the claims should have been examined together. But Applicants did acquiesce in the manner noted by the examiner in the previous Office action, and the filing of a divisional application is a decision unilaterally undertaken at the discretion of Applicants, requiring no agreement with the examiner.

Applicants argue that the facts of the instant reissue application are distinguishable from those of In re Orita, 193 USPQ 145 (CCPA 1977) because, in that case, the restriction was not traversed resulting in a missed opportunity to file a timely divisional application. This is not persuasive because Applicants (Reedy et al.) had the opportunity to timely file a divisional application and elected not to do so.

Applicants also argue that the facts here are similar to those of In re Doyle, 63 USPQ2d 1161 (CA FC 2002) such that Orita does not apply. But in Doyle 63 USPQ2d at 1165, the court stated that "(t)he case is different where, as here, the applicant never asserted the reissue claims or anything similar to them in his original application, and also never agreed to prosecute the reissue claims in a divisional application". Applicants' situation is distinguishable from Doyle because claim 7, filed with the preliminary amendment of August 26, 1996 in parent Serial No. 08/702,922, is substantially the same as independent claim 33 of this reissue application.

Furthermore, there were no linking claims (a determining factor in Doyle) explicitly directed to the additive of independent claim 19 of this reissue application in parent Serial No. 08/702,922.

After further reviewing the revised reissue declaration filed November 26, 2001, the examiner notes that it is also defective because it does not address all the amendments to claims 1, 10, 17 and 18 in the amendment also filed November 26, 2001. In paragraph 6 of the revised declaration, Applicants state that "the blowing agent in the original claims failed to recite that the blowing agent was a non-solid blowing agent comprised of a combination of atmospheric and organic gases", but do not explain why this is an error such that this limitation is now included in claims 1, 17 and 18. In addition, the revised reissue declaration filed November 26, 2001 does not address the substitution of "consisting essentially of" for "comprising" after "(a)" in claims 1, 17 and 18 and the amendment to claim 10. If these issues are rendered moot by the submission of another revised reissue declaration, claims 1-18 could be indicated as allowed and only the issues involving claims 19-50 would be before the Board Of Patent Appeals And Interferences.

Allan R. Kuhns

ALLAN R. KUHNS
PRIMARY EXAMINER A U 1732

9-30-02